

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK S. HADLEY
Claimant

VS.

MONTGOMERY COMMUNICATIONS, INC.
D/B/A DAILY UNION
Respondent

AND

ACCIDENT FUND INS. CO. OF AMERICA
Insurance Carrier

Docket No. 1,040,173

ORDER

Claimant requested review of the August 18, 2010 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on November 19, 2010 in Wichita, Kansas. E. Lee Kinch, of Wichita, Kansas, was appointed by the Acting Director as a Pro Tem in this matter.¹

APPEARANCES

Phillip B. Slape, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties acknowledged that the underpayment of temporary total disability benefits originally alleged is no longer in dispute and need not be addressed in this appeal.

¹ This assignment was made in light of the retirement of Board Member, Carol Foreman.

The parties were also asked whether a remand was in order if, as claimant requested, the Award was modified to include permanent impairment to the low back, and thus, entitle claimant to consideration of a whole body, unscheduled injury and a work disability under K.S.A. 44-510e(a). In response, respondent asked for such a remand if the above referenced issues were decided in claimant's favor.

ISSUES

The ALJ adopted the opinions of Dr. Fejar and granted claimant a 5 percent impairment to his left lower leg (at the 190 week level). She went on to find that claimant failed to prove he sustained a permanent impairment to his low back as a result of the March 28, 2008 accident. Thus, claimant's award was limited to the value of his scheduled injury. This appeal followed.

Claimant requests review of the nature and extent of his impairment. He contends the Award should be modified to increase his lower leg impairment (from 5 percent to the 11 percent assigned by Dr. Munhall) and to award an additional 5 percent whole body impairment to his lower back. Claimant also maintains he is entitled to a work disability for those periods in time that he has not earned comparable wages since his injury.

Respondent argues that the Award should be modified to adopt the opinions of Dr. Estivo, the treating physician, who found claimant had no permanent impairment to either his ankle or his low back as a result of his accident. Alternatively, respondent contends the Board should affirm the Award (granting claimant 5 percent impairment to the ankle) as there is no credible medical evidence to suggest that claimant suffered a permanent injury to his back when he fell at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and well-supported by the record. Accordingly, it is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein. Claimant alleges a March 28, 2008 injury to his left lower leg and his low back. He complains of ongoing limitations of motion and pain in his left ankle as well as persistent pain in his back which significantly limits his ability to work. At the regular hearing, claimant denied any previous low back complaints.

For purposes of this appeal the only issue to be decided is the nature and extent of claimant's impairment as a result of his work-related injury. Simply put, the Board must decide whether claimant's injury includes his low back or is limited to his left ankle, and to

what extent the involved body parts are permanently impaired, if at all. If his disability extends to his low back, then this matter is to be remanded to the ALJ for further proceedings and findings of fact and conclusions of law.

Claimant was working when he fell, and sustained an injury. However, the medical testimony reveals a disparity of opinions as to claimant's resulting impairment(s). Dr. Shane Fejar was claimant's initial treating physician and he provided conservative treatment to claimant's left ankle sprain. Dr. Fejar's records clearly document a left ankle injury, ongoing complaints, and the need for conservative treatment. But those same records do not initially reflect low back complaints, although there is a suggestion within the records that claimant was always voicing back pain during each visit to Dr. Fejar.² Nonetheless, Dr. Fejar did not rate claimant's back, instead assigning a 5 percent to claimant's lower leg (ankle) as a result of his work-related injury, and referring claimant to Dr. John Estivo.

Dr. Estivo noted claimant's back complaints as well as his lower leg problems. After a period of conservative treatment, Dr. Estivo opined that claimant had no permanent impairment to either his lower leg or his back. Essentially, Dr. Estivo found that claimant's ankle and back problems were merely sprains that resolved over time. Most significantly, Dr. Estivo did not observe any altered gait. In fact, he noted a "completely non-antalgic gait" with "no limp at all".³ And to the extent claimant was complaining of any back problems, Dr. Estivo attributed those to claimant's large size. He also explained that according to the records, the first notation in Dr. Fejar's records of low back complaints did not occur for nearly 5 weeks after the injury. Thus, Dr. Estivo was unwilling to concede that claimant had any low back impairment as a result of his work-related injury.

Claimant was also seen by Dr. Michael Munhall, at his lawyer's request. As of the time of this evaluation (June 2009), claimant was, according to Dr. Munhall, limping and suffering from muscle spasms in the back, so much so that dynamic testing was difficult to do during the examination. He rated claimant's impairment at 11 percent to the left lower extremity and 5 percent to the low back, all of which he attributed to this accident.

During the course of Dr. Munhall's deposition, it was revealed that Dr. Munhall had treated claimant in 2006. That injury involved his left knee and his low back. In fact, as of October 17, 2006, Dr. Munhall noted claimant's complaints of intermittent low back pain, well centralized without radiation into the right or left lower extremities. Dr. Munhall then opined that claimant "might require future and rehabilitation and/or orthopedic evaluation

² This suggestion comes in a handwritten note presumably entered by Dr. Fejar's office staff on May 7, 2008. The notation indicates that claimant's back complaints were *a/ways* part of his list of complaints and it appears that Dr. Fejar's office was attempting to get authorization to treat those complaints.

³ Estivo Depo., Ex. 2 at 1 (Dr. Estivo's Mar. 30, 2009 office note).

of persistent and progressive right knee pain and low back pain in evolution from the left knee injury sustained December 19, 2005 and December 23, 2005.”⁴

The ALJ specifically noted the fact that at the regular hearing, claimant denied any previous low back problems. Thus, the revelation that Dr. Munhall had *previously* identified and treated claimant for low back complaints led her to conclude that -

Claimant’s testimony as to the condition of his back due to the accident is not credible. Claimant testified he had no prior problems with his back. When Dr. Munhall saw [c]laimant in 2006 for his left knee injury, [c]laimant complained about low back pain at that time and Dr. Munhall opined that [c]laimant could need treatment in the future for his back condition as a result of the left knee injury. For these reasons, it is found and concluded that the [c]laimant did not suffer any permanent impairment to his lumbar spine as a result of the March 28, 2008 accident. Since [c]laimant has only suffered a scheduled injury [c]laimant’s request for a permanent partial general disability award based on task loss and wage loss is denied.⁵

The Board has reviewed the entire record and concludes that the ALJ’s conclusion to limit claimant’s impairment to his left lower extremity, based upon Dr. Fejar’s impairment opinion, is well reasoned. For whatever reason, claimant expressly denied any previous low back complaints while testifying before the ALJ. And unfortunately, this record contains no explanation as to why claimant would provide such testimony when it is clear that in 2006 he had low back complaints. Even more confusing, just as here, his earlier low back complaints resulted when he was receiving treatment for a knee injury and his gait was disturbed. Dr. Munhall provided no explanation as to how claimant’s present low back complaints are different from his earlier difficulties. And even Dr. Munhall’s records suggested that claimant could expect to experience further problems with his back as a result of his 2006 injury.

Thus, the Board is persuaded that the ALJ’s finding as to the extent of claimant’s impairment should be affirmed. Moreover, the Board affirms the ALJ’s decision to adopt the findings of Dr. Fejar and award claimant 5 percent to the left lower extremity. Claimant quite clearly bears permanency as a result of his sprained ankle and that injury warrants the impairment assigned by Dr. Fejar. Like the ALJ, the Board was not persuaded by the impairment opinions expressed by Dr. Munhall.

In summary, under these facts and circumstances, particularly given the ALJ’s finding as to claimant’s lack of credibility the Board finds the ALJ’s Award should be affirmed in its entirety.

⁴ ALJ Award (Aug. 18, 2010) at 3, citing R.H. Trans. at 21-24, 26; Munhall Depo. at 20-21 and Ex. 5.

⁵ *Id.* at 8.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated August 18, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge